PERWIRA HABIB BANK MALAYSIA BERHAD

v.

VISWANATHAN S/O RAMAKRISHNAN

HIGH COURT MALAYA, IPOH
KANG HWEE GEE J
[ORIGINATING SUMMONS NO. 24-817-1992]
1 FEBRUARY 1996

LAND LAW: *Charge - Order for sale - Cause to the contrary - National Land Code 1965, s. 256(3) - When Court may refuse application for sale.*

LAND LAW: *Charge - Indefeasibility of interest - Charge obtained by means of an insufficient instrument - National Land Code 1965, s. 340(2)(b) - Agent charging land in excess of authority.*

CONTRACT: *Agency - Authority of agent - Liability of principal - Power of attorney - Agent acting in excess of authority - Whether principal liable to third party - Construction of instrument - Rules applied by Court.*

WORDS & PHRASES: *"Cause to the contrary" - Section 256(3) National Land Code.*

This was an application by the chargee bank ('the plaintiff') for an order for sale under ss. 256 & 257 of the National Land Code 1965 ('the NLC') to satisfy an outstanding term loan of RM1,373,036,89 with interests due to the plaintiff on nine lots of land ('the land'). The land, belonging to the defendant, was charged by one Robert Cheong Teng Kong ('Robert') who did so purportedly under a registered power of attorney granted to him by the defendant. Robert had charged the land to the plaintiff to secure a term loan of RM500,000 for Teng Kong Enterprise Sdn. Bhd. ('TK Enterprise'). TK Enterprise was a sister company of Lee & Cheong Sdn. Bhd. ('L&C'), and Robert was a director of both companies.

At the hearing, the defendant opposed the application on the sole ground that the charges were executed by Robert in breach and in excess of the power of attorney granted to him. The defendant submitted that the power of attorney was granted to Robert only to enable the latter to fulfil the joint venture housing development agreement which the defendant had entered into with L&C. It was contended that Robert was only authorised to charge the land to the plaintiff for the benefit of a term in favour of L&C, not for the benefit of TK Enterprise.

Held:

[1] A decision on whether or not to allow the plaintiff's application for an order for sale could not be grounded on agency law alone, but on the broader investigation under s. 256(3) of the NLC. Agency law could not be applied directly to deny the plaintiff of his right which was contracted under the statutory provisions of the NLC. The plaintiff, being a registered chargee, acquired an indefeasible interest in the land under s. 340(1) of the NLC and could enforce the charge under s. 253(1) of the NLC.

[2] However, under s. 256(3) of the NLC, the Court may refuse an application for an order for sale if it is satisfied of the existence of 'cause to the contrary'. A chargor may 'show cause' either in law or in equity against an application for sale, and the Court should refuse to make an order in every case where it would be unjust to do so. In this context, 'unjust' means being contrary to those rules of common law and equity which are in force in the country.

[3] In the instant case, the Court was satisfied of the existence of a 'cause to the contrary'.

[4] In law, a person who holds a power of attorney is an agent of the person who grants him the instrument. The Courts generally construe the document strictly according to well-recognised law. Where an act purporting to be done under a power of attorney is challenged as being in excess of authority, it is necessary to show that the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. And in construing the powers embodied in a professionally drafted document, such as the one in the instant case, the rule to be applied is to regard the general object in the recitals as controlling the general terms in the operative part of the instrument.

[5] Following the usual principle of agency law, a person holding a power of Attorney who acts in excess of and outside the reasonable scope of his special powers will not make the donor of the power liable to a third party.

[6] There could be no dispute from the letters of the power of attorney and the agreement annexed to the charge that Robert had exceeded his authority by charging the defendant's land to the plaintiff to secure a term loan not for L&C as authorised, but for another totally different entity, i.e, TK Enterprise. There was hardly any need for the plaintiff to look beyond the four corners of the instrument to discover the limit of Robert's authority.

[7] The Courts have always construed the letters of deeds strictly. It would be a travesty of justice to ignore established agency law that a person is not liable for the act of his agent who acts in excess of his authority in favour of the indefeasibility which a third party acquires.

Obiter dictum:

[1] Whether the development of a piece of land has reached the percentage required under the terms of a power of attorney should not be the concern of an intending chargee. A chargee should not be made liable to investigate beforehand the stages of housing development before agreeing to take a charge of the land as these are matters of internal management of the contracting parties to which the chargee is not privy.

[2] A registered charge obtained from an agent who acted in excess of the authority granted to him under a power of attorney would constitute a charge that was obtained by means of an insufficient instrument within the definition of s. 340(2)(b) of the NLC. This provision would operate to deny the chargee of his indefeasibility.

[Application dismissed]

Cases referred to:
Magnum Finance Bhd. v. Ling Sing Ping [1988] 2 MLJ 403 ***(foll)***
Bryant Ltd. v. La Banque Du peuple [1893] AC 170 ***(cit)***
Subramaniam Pillay v. Sundarammal [1968] 2 MLJ 115 ***(cit)***
Danby v. Coutts & Co. [1855], 29 Ch. D 500 ***(cit)***
Jacobs v. Morris [1902] 1 Ch. 816 CA ***(foll)***
Murugappa Chettiar v. Letchumanan Chettiar [1939] MLJ 228 ***(foll)***
Public Finance Bhd. v. Narayanasamy [1971] 2 MLJ 32 ***(cit)***
Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1989] 1 MLJ 457 ***(refd)***
Associated Finance Corporation Ltd. v. Poomani [1972] 1 MLJ 117 ***(cit)***

Legislation referred to:
Federated Malay States Land Code (Cap 138), s. 149
Money Lender's Ordinance, 1951
National Land Code 1965, ss. 253(1), 256(3), 256, 257, 340(1), 340(3), 340(2)(b)

For the plaintiff - Lau May Ling; M/s. Shook Lin & Bok
For the defendant - Mohammad Asri bin Abas; M/s. Concisom & Co.

JUDGMENT

Kang Hwee Gee J:

In this Originating Summons the plaintiff chargee is seeking an order for sale under s. 256 and 257 of the National Land Code 1965 to satisfy an outstanding term loan of RM1,373,036.89 with interests due to the plaintiff on the following 9 lots of land.

i) H.S. (D) L.P. 106/84, P.T. No. 2670

ii) H.S. (D) L.P. 108/84, P.T.No. 2672

iii) H.S. (D) L.P. 118/84, P.T. No. 2682

iv) H.S. (D) L.P. 127/84, P.T. No. 2691

v) H.S. (D) L.P. 177/84, P.T. No. 2741

vi) H.S. (D) L.P. 188/84, P.T. No. 2752

vii) H.S. (D) L.P. 203/84, P.T. No. 2767

viii) H.S. (D) L.P. 212/84, P.T. No. 2776

ix) H.S. (D) L.P. 159/84, P.T. No. 2723

The sale is sought to satisfy an outstanding Term Loan of RM1,373,036.89 with interest due to the plaintiff bank pursuant to the terms and conditions in the agreement entered between the parties and annexed to the charge.

The lands were charged by one Robert Cheong Teng Kong purporting to act under a registered power of attorney granted to him by the defendant to secure a term loan of a sum not exceeding RM500,000 to Teng Kong Enterprise Sdn. Bhd. (see Exhibit PHB1 in encl. 2).

The defendant in his affidavit in reply to the plaintiff's application (drafted in the fashion of a statement of defence) did not dispute that as at the date of the filing of this summons the said sum was outstanding in the Term Loan account of Teng Kong Enterprise Sdn. Bhd., and that due statutory notice had been duly served, but opposed the plaintiff's application essentially on 2 related grounds, *viz*. that the lands were charged by the said Robert Cheong in excess of the power of attorney granted to him and that the plaintiff had by its servant or agent colluded to disburse loans far in excess of the value of the lands charged.

In reply, Hong Lay Chuan, the plaintiff's manager averred in his affidavit (encl. 7) that Teng Kong Enterprise Sdn. Bhd. the company to whom the plaintiff granted the RM500,000 loan was in fact a sister company of Lee & Cheong Sdn. Bhd. and Robert Cheong Teng Kong was a director of both companies. At the time the charge was created Teng Kong Enterprise Sdn. Bhd. who was in fact the company undertaking development of the lands and had completed over 20% of the housing development as evidenced by the 3 architect certificates exhibited as PHB7 in his affidavit. The defendant's allegation that Robert Cheong Teng Kong had acted in excess of his authority in the power of attorney, he contended was therefore not true as the loan was in fact granted for benefit of the Lee & Cheong Sdn. Bhd.

At the hearing before me Counsel intimated that he was only proceeding with the ground that the charges were executed by Robert Cheong Teng Kong in breach and in excess of the power of attorney as averred in para. 5 of the affidavit in reply of the defendant. As authority he cited *Magnum Finance Bhd. v. Ling Sing Ping* [1988] 2 MLJ 403, which he submitted was on all fours with the facts of the present case. The power of attorney in the present

case, he submitted, was granted to the said Robert Cheong to enable him to carry out joint venture housing development agreement the defendant had entered into with a company called Lee and Cheong Sdn. Bhd. Under clause 6 of the power of attorney the said Robert Cheong was only authorised to charge the lands for the benefit of Lee and Cheong Sdn. Bhd. but he had instead charged the lands for the benefit of another company Teong Kong Enterprise Sdn. Bhd.

In order to appreciate the defendant's opposition to the plaintiff's application, it would be necessary for me to narrate in some details the facts preceeding the creation of the charge as disclosed in the affidavits of the parties.

On 23 March 1979 the defendant entered into a joint venture agreement (Exhibit UR1 in defendant's affidavit) with Lee and Cheong Sdn. Bhd., to develop 2 pieces of land belonging to the defendant (HS(D) LP 35/78 and HS(D) LP 36/78) into a housing estate. By clause 2(b) of the agreement the defendant agreed to grant a power of attorney to Robert Cheong Teng Kong of Lee and Cheong Sdn. Bhd. The clause reads as follows:

> 2(b): To enable the company to expedite the development of the said land the beneficial owner hereby agrees to grant an irrevocable power of attorney to Robert Cheong Teng Kong of the aforesaid company to do all acts, deeds and things necessary and to execute, sign and endorse all such plans and forms as may be required by the company to effect subdivision of the said land and to obtain subdivisional titles thereof and to effect development thereon and to sign all plans for road and drains and for better performance by the company of their duties and obligations pursuant to this agreement to execute all whatever agreement so required for the development under this agreement."

In compliance with the said Clause 2(b) of the agreement, the defendant executed a power of attorney (Exhibit VR2) on 23 March 1979. Clause 6 of the said power of attorney reads as follows:

> 6. Upon the company having commenced construction on the said land (upon the company having completed twenty percent (20%) of the housing development of the said land) as certified by the architect or designer for the time being of the company (which certificate shall not be disputed) to charge or mortgage (including deposit by way of equitable charge) the said land or the portions thereof as provided by cl. 25 of the said agreement for the benefit of the company and subject to such covenants as my attorney may think fit.

On 14 June 1984 using the power of attorney the said Robert Cheong charged the 9 lots of defendant's land (the subject matter of the present application which presumably were subdivisions from the original 2 titles mentioned in the joint venture agreement) to the plaintiff bank. The purpose of the charge was stated in the charge Borang 16A in Bahasa Malaysia as:

Bagi maksud menjamin - Di atas permintaan penggadai pemegang gadai membenarkan Term Loan tidak lebih dari jumlah wang sebanyak RM500,000 kepada M/s Teng Kong Enterprise Sdn. Bhd. yang beralamat di No. 69A, Jalan Leong Sin Nam, Ipoh Perak.

Clause 1 of the agreement annexed to the charge Borang 16A confirmed the above purpose in the following terms:

I, the abovenamed Viswanathan s/o Ramakrishnan (KP No. 1766333) of Kulumpang Railway Station. Kulumpang, Ulu Selangor.

(hereinafter called the "chargor(s)") Do hereby agree covenant and undertake with the abovenamed

Perwira Habib Bank Malaysia Berhad

(hereinafter called the "Bank") as follows:

1. In consideration of the Bank having agreed to lend to M/s. Teng Kong Enterprise Sdn. Bhd. of No. 69A, Jalan Leong Sin Nam, Ipoh, Perak.

(hereinafter called the "borrower") an amount of Malaysian Ringgit Five Hundred Thousand (RM500,000) only

the chargor(s) undertake(s) that he will pay on demand to the Bank

(1) the said sum of Malaysian Ringgit Five Hundred Thousand (RM500,000) Only

(hereinafter referred to as the "Loan" which expression shall include wherever the context so permits any balance or part thereof) together with interest thereon at the rate of

Three per cent (3%) above Base Lending Rate (The Base Lending Rate is currently at 10.75% per annum

per centum (.) per annum (hereinafter referred to as the "prescribed rate" which expression shall include where and when applicable such other rate as may from time to time be substituted therefor in the manner hereinafter provided) and until demand as aforesaid to ensure that the borrower repay the loan and interest thereon at the prescribed rate by the instalments at the times and in the manner following that is to say ...

It could be readily appreciated that the power which was given to Robert Cheong was by clause 6 restricted to charging the defendant's lands for the benefit of Lee and Cheong Sdn. Bhd. and only when the company had completed 20% of the housing development contracted under the joint venture agreements. It is also clear from the endorsement in the charge Borang 16A above and the annexure therein that the charge was executed as security for a loan of RM500,000 to a totally different company called M/s. Teng Keong Enterprise Sdn. Bhd.

Before proceeding to consider the plaintiff's application on the merit, it would be necessary for me first to set down in brief the law relating to powers of attorney in so far as it is necessary for the disposal of this application.

A power of attorney is a deed by which a donor confers authority on the donee to act on behalf of the donor's behalf. In law a person who holds a power of attorney is an agent of the person who grants him the instrument. Courts generally construe the document strictly according to well-recognised rules. To illustrate, I need only quote the oft-cited dictum for Lord Macnaghten in the Privy Council case (on appeal from Canada) of *Bryant, Powis, and Bryant Ltd. v. La Banque Du peuple* [1893] AC 170, at p. 177 which was cited with approval by Suffian FJ in the former Federal Court case of *Subramaniam Pillay v. Sundarammal* [1968] 2 MLJ 115:

> Nor was it disputed that where an act purporting to be done under a power of attorney is challenged as being in excess of authority of the power conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

Further, in construing the powers in a professionally drafted instrument (such as in the present case), the rule to be applied is to regard the general object in the recitals as controlling the general terms in the operative part of the power of attorney (see *Danby v. Coutts & Co.* [1855], 29 Ch. D 500). Indeed this principle of construction was applied in *Magnum Finance* (*supra*) cited by Counsel for the defendant earlier which I will now consider.

In that case the defendant's attorney acting under the power of attorney granted to him by the defendant charged the defendant's land to the plaintiff contrary to the purpose of a joint venture agreement the defendant had entered with the company of whom the donee of the power was managing director. Under clause 3 of the said agreement it was made clear that the power of attorney had been executed for the sole purpose of facilitating the operations of the agreement and under clause 21 of the power to charge the defendant's property was limited to the developer's lots which could only be ascertained after subdivision (which apparently had not yet been carried out at the time). Purporting to act under the (general) power granted to him under the power of attorney the donee executed 3 charges on the defendant. The first and second charges were as securities for monies owed by the developer to two other financial institutions. The third charge for a sum of RM1.4 million was executed in favour of the plaintiff and out of which RM1 million was used to redeem the donee's property together with the defendant's own property with Public Bank which was outside the powers granted to the donee.

It was held (Siti Norma Yaakob J) that the plaintiff owed a duty when the charge was created to at least inquire into the circumstances surrounding the execution of the power of attorney, the purpose of its execution and the

limitations imposed on it by law. The Court rejected the plaintiff's argument that it owes no duty of care to enquire into the donee's authority which was on the face of clause 6 of the power of attorney expressly gave the power to charge the defendant's property. It held that in construing a power of attorney the general words giving the power need to be viewed against the objects of the power of attorney which in that case were clearly spelt out in the recitals limiting the donee's powers to the terms and conditions of the joint venture agreement. It was not open to the plaintiff to disclaim knowledge of the subsisting agreement between the developer and the defendant nor the legal construction of the power of attorney. The Court refrained from making an order of sale of the charged land in favour of the plaintiff and stayed the foreclosure proceedings pending the determination of a civil suit which the defendant in that case had filed against the plaintiff arising out of the charge.

Having stated the law. I will now return to consider the plaintiff's case. I will begin with the interpretation of clause 6 of the power of attorney.

In my judgment, whether or not the development of the land had reached the percentage required under clause 6 of the power of attorney before the land could be charged by Robert Cheong Teng Kong should not be the concern of plaintiff when it decided to take a charge of the defendant's lands. It is clear to me that in the context of the joint venture agreement, essentially that provision was not meant to constitute the power itself but was meant to regulate the conducts of the parties to the joint venture. A third party in the position of the plaintiff should not therefore be made liable to investigate beforehand the stages of housing liable to investigate beforehand the stages of housing development before agreeing to take a charge of the lands as these are matters of internal management of the contracting parties to which the plaintiff was not privy.

However, there could be no dispute from the letters of the power of attorney and the agreement annexed to the charge, that the holder of the power of attorney Robert Cheong had exceeded his authority by charging the defendant's lands to the plaintiff to secure a loan not for Lee and Chong Sdn. Bhd., as authorised but for another company Teong Kong Enterprise Sdn. Bhd., contrary to the specific power granted to him under clause 6 of the power of attorney. Unlike in the *Magnum's* case there was hardly any need for the plaintiff to look beyond the four corners of the power of attorney to discover the limit of Robert Cheong's authority. It is therefore not necessary to employ the principle of construction of powers of attorneys as enunciated in that case. The fact that Teong Keong Enterprise Sdn. Bhd. was a sister company of Lee & Cheong Sdn. Bhd., that Robert Cheong was a director of both, and that Teong Keong Enterprise was in fact the company undertaking the development of the housing scheme, would not have absolved the plaintiff from the consequence of having taken a charge from an agent of the defendant without the defendant's authority as in law the companies were entirely two different persons.

Following the usual principle of agency law, a power of attorney, who acts in excess of and outside the reasonable scope of his special powers will not make the donor liable to a third party (see *Jacobs v. Morris* [1902] 1 Ch. 816 CA). This established principle alone will operate to protect the defendant against any normal contractual claim in respect of acts purportedly performed by his agent.

But agency law cannot be applied directly to deny the plaintiff of his right which is contracted under the statutory provisions of the National Land Code. This is so because a registered chargee acquires an indefeasible interest in the land under 340(1) of the National Land Code and can enforce his charge by obtaining on order for sale under s. 253(1) where there is a breach on the part of the chargor of the agreement relating to the charge. Under s. 256(3) on such an application being made, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of "cause to the contrary". A decision whether or not to allow the plaintiff's application for sale therefore, could not be grounded on agency law alone but on the broader investigation under s. 256(3) whether there is cause to the contrary not to order sale which the Court must undertake.

The exact scope of "cause to the contrary" has not been defined anywhere in the Code but the phrase "cause to be shown to the contrary" which was used in the equivalent provision of s. 149 of the previous Federated Malay States Land Code (Cap 138) was construed in the pre-war case of *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 228 as follows:

> Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'show cause' either in law or in equity against an application for sale, and that the Court should refuse to make an order in every case where it would be unjust to do so. By unjust I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States. (per Aitken J)

Apart from *Magnum Finance*, (*supra*), the facts of which have been described earlier, other instances where the Court "is satisfied of the existence of cause to the contrary" to refuse an order of sale under s. 256 of the National Land Code are not uncommon. Thus in *Public Finance Bhd. v. Narayanasamy* [1971] 2 MLJ 32, an order for sale under s. 256 of the National Land Code was refused by the then Federal Court on the ground that the chargees appellant had committed fraud by colluding with the chargor respondent to defeat the rights of purchasers who had purchased sub-divided lots from the respondent before the charge had been created.

In *Associated Finance Corporation Ltd. v. Poomani* [1972] 1 MLJ 117, a moneylender's application for sale of the land charged to them was refused on account of the infringement by the moneylender of the several provisions of the Money Lender's Ordinance 1951 which would render the loan agreement unenforceable.

The phrase was however given a more restricted interpretation in the Privy Council case of *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1989] 1 MLJ 457 which could be found in the following passage at p. 460 of the judgment.

> Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the Court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

Magnum Finance (*supra*) appears to be the closest authority that I can rely on to deny the plaintiff an order of sale on the ground that the charge of the defendant's lands was created by an agent who acted in excess of his authority under a power of attorney. In the present application, in deciding whether or not to order sale I would have to direct my mind to the fact that Courts have always construed the letters of deeds strictly. It would be a travesty of justice to ignore established agency law that a person would not be liable for the act of his agent who acts in excess of his authority in favour of the indefeasibility which the plaintiff acquires. I am satisfied that there is in existence in the present case a cause to the contrary that the order for sale applied for by the plaintiff should not be made, and accordingly I would refrain from making the order.

While still on the subject, it may be appropriate at this stage for me to consider a related issue on indefeasibility mooted by Associate Professor and Deputy Dean, Faculty of Law, University of Malaya, Mr. Teo Keang Sood in his article "Application for order for sale of Land: Of conduct of chargees. The position of *bona Fide* purchasers for value and Illegality" [1989] 3 MLJ p. (i) part of its contents of which I had relied on for the purpose of this judgment. Commenting on the cases in which the Court had refused to order sale which I described earlier, he commented:

> It may be observed that in the cases noted above, the Court in refusing the application for sale did not make reference to the relevant provisions in the Code relating to indefeasibility which could have been used for the purpose of setting aside the charges in question. The exceptions to the indefeasibility provisions could have been relied upon by the Court in *Associated Finance Corporation Ltd.* to refuse the order for sale on the ground that as the loan agreement, pursuant to which the charge was created, was unenforceable at law, this in turn rendering the charge instrument void which had the effect of making the registered charge a defeasible one. In not making any reference to the

> indefeasibility provisions, the above two cases would appear to indicate that the circumstances in which an order for sale can be refused need not necessarily be confined to one of the statutory or recognised judicial exceptions to the indefeasibility provisions in the Code.

Counsel for the plaintiff in the present case however, did not attempt to raise the status of indefeasibility which undoubtedly the plaintiff had acquired upon registration of the charge (which until set aside under s. 340(3) would remain in force) as a shield against the imperfection of its creation. But had Counsel done so, then the antedote lies in s. 340(2)(b) which provides that:

> The title or interest of any such person or body shall not be indefeasible - where the registration was obtained by forgery, or by means of an insufficient or void instrument;

A registered charge obtained from an agent of the defendant who had acted in excess of the authority granted to him under a power of attorney as in the present case would in my view, constitute a charge that is obtained by means of an insufficient instrument within the meaning of this provision which would operate to deny the plaintiff of his indefeasibility.

The plaintiff's application is dismissed with costs.

Reported by Gan Peng Chiang